



Save Our Groundwater

P.O. Box 182
Barrington, NH 03825

February 9, 2005

RECEIVED

FEB 09 2005

Michael Sclafani, Appeal Clerk
NHDES, Water Council
29 Hazen Drive, PO Box 95 Concord, NH 03302-0095

HAND DELIVERED

Re: Docket No. 04-14 WC SOG Motion for Reconsideration

Dear Mr. Sclafani:

Enclosed are an original and twenty copies of Save Our Groundwater's *Motion for Reconsideration*, regarding the Water Council's action the Water Council's Denial of January 13, 2005.

Thank you for your cooperation in this matter, if you have any questions you can reach me at [603] 742.2134 or email at billmccann4545@msn.com.

Sincerely,

SAVE OUR GROUNDWATER

COPY
Bill McCann
Bill McCann

Board Member, Pro Se

Cc: Michael Nolin, NHDES
Harry Stewart, NHDES
Mark Beliveau, Esq.
E. Tauper Kinder, Esq.
Armand Hyatt, Esq.
Tony Soltani, Esq.
Assistant Attorney General Richard Head, DOJ

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL**

**Appeal of the Board of Directors of Save Our Groundwater
Docket No. 04-17 WC**

SAVE OUR GROUNDWATER'S MOTION FOR RECONSIDERATION

In accord with RSA 541:3 and Env-WC 203.29 [a], the Board of Directors of Save Our Groundwater move that the Water Council reconsider its decision of October 13, 2004 Declining to Accept the Notice of Appeal, said decision issued in written form on January 13, 2005, and in support thereof states as follows:

1. Save Our Groundwater, hereinafter SOG, filed a Motion for an Adjudicative Hearing with New Hampshire Department of Environmental Services, hereinafter NHDES, on July 30, 2004 concerning LGWP 2004-0003.
2. NHDES denied SOG's Motion for and Adjudicative Hearing on August 9, 2004.
3. SOG filed a Notice of Appeal to the State of New Hampshire Water Council, hereinafter Water Council, On August 24, 2004 appealing the denial of the Motion for Adjudicative Hearing.
4. On August 31, 2004 NHDES through the Attorney General's Office, hereinafter, DOJ, filed a Motion to Dismiss SOG's appeal.

5. On September 1, 2004 SOG filed a Revised Notice of Appeal with the Water Council.
6. SOG filed an Objection to the Motion to Dismiss by NHDES on September 8, 2004.
7. On October 11, 2004 SOG raised concerns, by letter to the Water Council, about the lack of impartiality of DOJ acting as Counsel to the Water Council.
8. On October 13, 2004 the Water Council met with their DOJ Attorney acting as Legal Counsel in non-public session for approximately an hour, after which the Water Council voted "not to accept the appeals of Nottingham and Save Our Groundwater due to lack of jurisdiction".
9. On January 13, 2005 the Water Council issued its "Decision and Order Declining to accept Appeal of Docket No. 04-17 WC".

Hence this Motion for Rehearing/Reconsideration in accord with RSA 541:3 and Env-WC 203.29.

A. Appropriate Route for Appeal is to the New Hampshire Water Council

It is SOG's view, supported by Supreme Court decisions, that this appeal should be unnecessary. We filed our Appeal on July 30, 2004, it was denied by NHDES on August 9, 2004. We Appealed that decision to the Water Council on August 24, 2004, in our view that request should have resulted in an Adjudicative Hearing and at the conclusion of that process, an Appeal to the Supreme Court may ensue. This reading of the statutory scheme is harmonious, accounts for all the statutes, is reasonable, and does not create an absurd or unjust result.

The clear reading of NH Law provides that SOG's appeal of the Denial of August 9, 2004 is to the Water Council. The Water Division of NHDES denied SOG's request for an Adjudicative Hearing, this triggered RSA 21-O: 7 which states the Water Council "shall" hear the appeal. NHDES has argued, through its DOJ Attorneys that such is not the case, they contend that the Appeal should be in accord with RSA 541.

In support of this position DOJ has argued that the "only" means to appeal a decision is RSA 485-C: 21, which totally ignores RSA 21-O.

Our Supreme Court has addressed issues such as this in the past and has concluded, "If any reasonable construction of the two statutes taken together can be found, this court

will not find that there has been an implied repeal. When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to a reasonable results and effectuate the legislative purpose of the statute". (Appeal of Campaign for Ratepayers Rights 142 NH 629, @ 631).

In another case in 2003 the court held: "We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme". (Nilsson v. Bierman 150 NH 393, @ 395)

Based on this it is SOG's view that the proper view of the process is as follows: SOG files for Adjudicative Hearing, NHDES denies said request, SOG appeals to Water Council, Water Council hears Appeal, then an Appeal to the Supreme Court may be appropriate. This is a reasonable approach to providing a process, which gives equity to the parties, and yet provides due process. This is consistent with what the Court said in Sprague Energy Corp. v. Town of Newington "statutes should be construed so that they lead to reasonable results" (142 NH 806).

The arguments raised by DOJ on behalf of NHDES are labored and not harmonious with the clear reading of the two statutes. Now in the denial it's claimed that **another** Opinion of the DOJ supports their position and ignores the prior decisions of our Supreme Court. This argument, involving the Opinion, has several flaws, which are detailed below.

The Opinion is dated September 2, 2004 and is from Senior Assistant Attorney General Jennifer J. Patterson to Commissioner Michael P. Nolin and is a “work in progress”. In the opinion the author states” the agency’s current practice should be modified so as to better comply with the Act”. (Pg. 3 Sep. 2, 2004 opinion, emphasis added). This document is making recommendations to the Commissioner for future actions such as “current practice” and a recommendation that application forms “be modified”. Clearly the author is offering legal advice to Comm. Nolin regarding implementation of the Comprehensive Shore land Protection Act.

The impact of providing guidance to the Commissioner about one statute cannot be used to require the dismissal of SOG’s appeal under another statute. Why, then is this opinion being presented to the Water Council, by DOJ, as an argument to deny SOG’s Motion of Appeal for an Adjudicative Hearing?

In the Denial by the Water Council a statement is made concerning the relationship between RSA 483-B and RSA 485-C and is alleged to be part of the conclusion or conclusions of the Patterson opinion, when in fact the opinion does not make such a claim. In that statement it is claimed that the language in 483-B: 18 III “is the same language in RSA 485-C: 21 VI”. This view is then relied on to determine that SOG’s appeal should have been to the Supreme Court “and not to the Council”. (Page 4 Decision) There are two problems with that statement and the resulting conclusion.

1--RSA 483-B: 18 III talks about "penalties". Section (c) talks about "administrative fine of up to \$5,000". It then goes on to say that rehearing and appeals on these fines "shall be governed by RSA 541". RSA 485-C: 21 has no provision about fines or any penalties. Clearly, RSA 483-B: 18 III c is not "the same language in RSA 485-C: 21 VI. [Just a note, RSA 483-B: 18 III does talk about an appeal under RSA 541, however, this is only after a hearing "pursuant to RSA 541-A" which is what SOG has been pursuing since July 30, 2004.]

2—It is clear that the introduction of the September 2, 2004 Opinion raises other concerns. Even if the interpretations outlined in the Opinion/Decision were valid, they were not in effect at the time of the issuing of LGWP 2004-0003 nor the filing of the appeal by SOG and other parties during July of 2004. To attempt to utilize this argument (9/2/04 Opinion) appears to be in violation of Part I Article 23 of the New Hampshire Constitution. This behavior by DOJ in presenting this argument supports the concerns raised by SOG October 11, 2004 regarding the issue of Conflict of Interest, which will be detailed below. In addition to making labored and torturous arguments of alleged conflicting statutes, DOJ now attempts to introduce an ex post facto legal opinion on another law to defeat SOG's right to an Adjudicative Hearing before the Water Council. As stated above the Patterson Opinion did not put this claim forth. We ask the Council to reject this illegal premise and grant our Motion of Reconsideration.

B. Conflict of Interest by DOJ Attorneys deprives Water Council and SOG to impartial determination of the issues.

The Water Council in its decision and Order Declining to Accept Appeal dated January 13, 2005, hereinafter Decision, states "there is no conflict between the two bureaus in the Attorney General's Office." This statement, made in the present tense, is misleading at best, since it does not mention what has transpired prior to the issuance of the Decision on January 13, 2005.

According to statements made by the Appeals Clerk of the Water Council, copies of letters, Motions and other materials issued by the attorneys in the DOJ, representing NHDES were routinely being given to the DOJ attorney who serves as Counsel to the Water Council. This even includes SOG's letter of October 11, 2004 raising the issue of conflict of interest and inquiring about an "ethical wall" or "Chinese wall" to protect the impartiality of the advice given to the Water Council by its DOJ Legal Counsel.

The fact that the Attorney for NHDES in DOJ is providing written materials to the DOJ Attorney who is Counsel to the Water Council defeats the intent of the law pertaining to the role of the Water Council.

RSA 21-O: 7 IV states "The Water Council shall hear and decide all appeals from department decisions...other than...those relative to wetlands". NHDES, for reasons of their own, do not want the issue of LGWP No. 2004-0003 to have an adjudicative

hearing, based on their denials of SOG's and Nottingham's request for same in the past. Now they, apparently on your behalf, argue again against the clear reading of RSA 21-O: 7 + 14. In November of 2003 the Court issued a decision known as Sanborn Regional School District v. The Budget Committee of the Sanborn Regional School District in which they addressed the issue of two statutes as follows: "When interpreting two statutes which deal with a similar subject matter, we ... construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute". NHDES and/or DOJ seem inclined to disregard the spirit if not the letter of Supreme Court decisions issue in the last several years.

Now, on page 4 of the Decision Appeal of Trotzer, (143 NH 64) and Appeal of Houston (150 NH 410) are cited to explain the claim of no conflict of interest. A closer reading will disclose no actual citation from either case to support their position. Both cases deal with different facts than this pending matter.

In Trotzer, the issue concerns the role of DOJ Attorney's as "prosecutor" and "Counsel" to the Board of Examinators of Psychology and Mental Health Practice in a case of License Suspension. In that case the Supreme Court found it "permissible" for the attorneys to act as they did in a quasi-judicial role.

In Houston, the Court stated" we address nearly identical claims in..Trotzer...we decline to overturn Trotzer". While the Court stated the DOJ's Attorneys "may be authorized to represent several government agencies", the Court went on to say," by our

ruling, we do not intend to imply that the ethical obligations of public and private attorneys are different in all circumstances". The Court concluded, "We are not called upon in this opinion to discuss the circumstances under which public and private attorneys are subject to the same ethical obligations". (Appeal of Houston, 150 NH 410)

In the two cases cited, the parties were the State and a citizen. While some may argue about issues like "just cause" in those cases, they are different than the case of the Appeal of SOG to the Water Council.

SOG has asked that the Water Council review a decision of NHDES, which RSA 21-O: 7 says the Council "shall hear and decide". As a party to the dispute NHDES, through the DOJ, should not be in a position to influence the decision of the Water Council. While the Court has not given guidance on this particular type of issue, so it is logical to look to other resources.

It is SOG's view going back to our letter of October 11, 2004 that a "Chinese" or "ethical wall" should be in place to protect both the Water Council and SOG and Nottingham from any undue influence or potential conflict of interest of DOJ Attorneys representing NHDES.

Black's Law Dictionary describes an "ethical wall" in part as follows: "Creating an ethical wall generally entails (1) prohibiting certain lawyers and paralegals from

having any connection with the matter; (2) banning discussions with or the transfer of documents to those individuals; (3) restricting access to files;" (emphasis added)

The record in this proceeding indicates that these actions were not taken by DOJ despite our letter of October 11, 2004. As a result the advice given to the Water Council on October 13, 2004 by the Council's DOJ Legal Counsel is on its face tainted by the position taken by NHDES as represented by DOJ's Attorney in documents given to the Water Council's DOJ Attorney who serves as Legal Counsel to that body. As a result the decision is unlawful and unreasonable and should be reconsidered by the Water Council.

In conclusion, the Water Council's decision Declining to Accept SOG's appeal is unlawful and unreasonable for the reasons set forth above and set forth in its Objection to the Motion to Dismiss Appeal date September 8, 2004, and in its Notice of Appeal dated August 24, 2004, with attachments thereto, all of which are incorporated by reference as if fully set forth herein.

WHEREFORE, SOG respectfully requests the Water Council to grant SOG's Motion for Reconsideration, Grant SOG's Motion for an Adjudicative Hearing and hold said Adjudicative Hearing in accord with Enc-WC 200 and RSA 541-A.

Respectfully submitted,

**SAVE OUR GROUNDWATER
BOARD OF DIRECTORS**

COPY
Bill McCann

By Bill McCann, Board Member
On behalf of the
Board of Directors, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed first class, and postage prepaid to Michael Nolin, NHDES, Harry Stewart, NHDES, Mark Beliveau, Esq., Armand M. Hyatt, Esq. E. Tupper Kinder, Esq, Tony Soltani, Esq. and Assistant Attorney General Richard Head.

COPY
Bill McCann

Bill McCann, Board Member